No. 44.

IN THE

# Supreme Court of the United States

October Term, 1945.

UNITED STATES OF AMERICA,

*Appellant,*

v.

AMERICAN UNION TRANSPORT, INC., D. C. ANDREWS & CO., INC., ATLANTIC FORWARDING CO., INC., *et al.*,

*Appellees.*

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

## BRIEF FOR THE APPELLEES.

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*Attorney for Appellees.*

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### Opinions Below.

The opinion of the District Court on motion for interlocutory injunction by plaintiffs and for summary judgment by defendant is reported in 55 F. Supp. 682; opinion on reargument is reported in 55 F. Supp. 682; opinion on final judgment has not been reported.

### Jurisdiction.

The judgment of the District Court was entered on November 30, 1944. Petition for appeal was filed and appeal was allowed January 27, 1945. Probable jurisdiction was noted April 2, 1945. The jurisdiction of this Court rests on Section 31 of the Shipping Act of 1916 (39 Stat. 728;

46 U. S. Code 830), the Urgent Deficiencies Act of 1913 (38 Stat. 220; 28 U. S. Code 47a), and Section 238 of the Judicial Code (43 Stat. 938; 28 U. S. Code 345).

## Statute Involved.

The statute involved is the Shipping Act of 1916 (39 Stat. 729, 46 U. S. Code 801, *et seq.*) and set forth in the Appendix hereto.

## Questions Presented.

The question of the jurisdiction of the Maritime Commission over non-carrier connected forwarders as "other persons subject to this (the Shipping) Act" (1916) is here for the first time. The questions presented by the appeal are:

(a) Did the procedure of the Commission in issuing its order of August 21, 1942, conform to the requirements of due process of law, particularly with relation to notice, hearing, and the basic prerequisites of proof?

(b) What is meant by the statutory phrase "carrying on the business of forwarding in connection with a common carrier by water?"

(c) Did the procedure of the Commission antecedent to the order of May 18, 1943, conform to the basic requirements of due process of law, hearing, and proof; and was there any warrant in the whole record or reasonable basis in the law, for concluding that the Commission had jurisdiction of the appellees?

## Statement.

This action challenges the validity of two orders of the Maritime Commission asserting jurisdiction for the first time since 1916 (R. 49) over a class of merchants operat-

ing as shippers' agents and described as freight forwarders.

The first order dated August 21, 1942, issued *ex parte*, made a definitive finding of jurisdiction over plaintiffs, and directed an investigation. The second orders of January 14th and May 18, 1943, directed the plaintiffs, as persons so subject to the Commission's jurisdiction under Section 21 of the Act (46 U. S. Code 820) to answer certain questions under penalty of a fine of $100 per day. The circumstances under which these orders were issued are:

On April 30, 1942, the Maritime Commission received a letter from the Angier Chemical Company, complaining that Foreign-Freight Forwarders, Inc., now defunct, and not a party hereto, had overcharged it. The complaint was informally investigated by the Commission, and the complainant advised (R. 72) that "his remedy against the forwarder is * * * an action on contract." That complaint was made the subject of a memorandum (R. 72) to the Commission by its Director of Regulation, recommending a general investigation and attaching a proposed order (R. 67) which the Commission executed on August 21, 1942 (R. 11). It was an entirely *ex parte* order and recites in part (R. 11):

> "It appearing, That each of the persons named in Appendix A herein carry on the business of forwarding in foreign commerce and that each of them is an 'other person subject to this Act' within the meaning of that term as used in sections 1 and 17 of the Shipping Act, 1916, as amended;"

The statutory test of jurisdiction is whether the forwarding is "in connection with a common carrier by water."

It ordered a general inquiry (R. 12) "* * * concerning the lawfulness of the rules, regulations, practices, and

operations of said forwarders * * *." There was no statement therein that "carrier connection", a prerequisite of jurisdiction, was to be a subject of inquiry.

The scope of the inquiry was stated in a letter from the Director of Regulations to the Imperial Forwarding Company (R. 43, 49), stating that the inquiry was "for the purpose of developing facts upon the basis of which the Commission can formulate a sound regulatory policy * * *." The power to regulate was taken for granted.

The Commission had before it four letterheads of plaintiffs (R. 32) "to substantiate the contention of the Government that the plaintiffs carry on the business of forwarding in connection with a common carrier by water as defined in the Act, * * *." The Director of Regulations later explained the grounds for the Commission's jurisdictional finding by stating (R. 83) "* * * you can't be in my job very long without getting a great deal of gossip and rumor going around, and I knew I had heard a great deal of gossip and rumor in connection with the practices of some of the forwarders."

In the fall of 1942, after the issuance of the initial order and before any hearings were had, the Commission sent to all the respondents (R. 31) named therein (including the appellees) an informal questionnaire (R. 136) which contained the following question (R. 32, 136):

> "Do you carry on the business of forwarding in connection with common carriers by water in foreign commerce?"

and received affirmative answers.

It propounded another question, numbered 33 (R. 137):

> "33. Is your company owned or controlled by or affiliated with any shippers for whom you act as

forwarder or with any common carrier? If so, explain."

The answers as to carrier connection were negative.[1] The affirmative answers to the first of the above questions were made by laymen, without understanding the legal conclusions which might be based thereon, and in the belief that such answers would result in the receipt of lend-lease forwarding business then being assigned by the War Shipping Administration—a Maritime Commission associated agency. The Court below found (R. 129) that the evidence before it and before the Commission contradicted the admission made by plaintiffs, and that such admissions were erroneous.

On December 9th and 10, 1942, hearings were held by the Commission at New York. No subpoenas were issued to plaintiffs, nor were they requested to attend and give testimony as to their carrier connections. At the conclusion of the second day's hearing, counsel for the Commission *sua sponte* moved an adjournment without date. The hearing was not resumed.

At the hearing, the Commission produced one witness, Mr. Harold C. Dow, an employe of the War Shipping Administration, who testified (R. 53-63) concerning the nature and character of the plaintiffs' business.[2] His testimony did not, as the District Court indicated (R. 122) differ from the description of such business made by Mr. Herbert A. Byrne (R. 39-40), on behalf of the plaintiffs in the court below.

The substance of Mr. Dow's testimony was that appellees are (R. 55) "a sort of representative of the exporter or shipper" and performed what "the shipper would or-

1. The negative answers appearing in the original questionnaires offered in evidence (R. 53) are included in the papers upon which judgment below was rendered (R. 117-118); specified in the praecipe for transcript of record (R. 134); but not printed here.

2. This testimony is printed in note 9, *post*.

dinarily have to perform in order to see that the goods arrive at destination."

Thereafter, on January 14, 1943, the Commission entered a second order (R. 19) under the provisions of Section 21 of the Shipping Act (46 U. S. Code 820), directing the plaintiffs, as persons subject to its jurisdiction, to answer numerous questions within thirty days, under penalty of being fined $100 a day each for each day of default. This action was then brought, in which the Commission's power, on the record as a whole, to issue either of said orders was challenged.

On May 18, 1943, the Commission vacated its order of January 14th, and entered a new order (R. 27)[3] which modified the previous questionnaire and again required answers within thirty days under identical penalties. It recited that the information sought (R. 28):

> "is necessary to the proper administration of the regulatory provisions of the Shipping Act, 1916 * * *."

No inquiry into the jurisdictional fact of carrier connection was indicated. The validity of that order was submitted to the Court below by consent (R. 128) after being annexed to defendant's answer.

The District Court denied defendant's motion for summary judgment (R. 124), denied plaintiffs' motion to set aside the order of August 21, 1942, and granted a temporary injunction against the order of May 18, 1943.

Motion for reargument by defendant was denied (R. 124-126).

The Commission having no further evidence to submit to the District Court, the cause was, by stipulation, submitted and argued (R. 117) on the same evidence which was before the Court on the preliminary motions.

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3. The original order did not bear the approval of the Director of the Budget, as required by the Federal Reports Act of 1942 (56 Stat. 1079; 5 U. S. Code 139c). The new order of May 18, 1943 bore such approval.

Final judgment set aside the order of May 18, 1943, but declined to disturb the order of August 21, 1942 (R. 130).

## Summary of Argument.

### I.

The appellees argue that the initial determination of their status as persons subject to the jurisdiction of the Maritime Commission, contained in the order of August 21, 1942, was an entirely *ex parte* determination and was wanting in due process of law. There was no evidence of any "carrier connection" of any appellee before the Maritime Commission when it made its determination of the appellees' status, and thus there was no warrant in the record or reasonable basis in the law for the Commission to conclude it had jurisdiction. The initial determination was not reviewable when made but became reviewable when the Commission, by subsequent administrative action, issued orders, the disobedience of which subjected appellees to penalties.

### II.

The appellees are not engaged in "the business of forwarding in connection with a common carrier by water" since none of them has any relationship of any kind, contractual or otherwise, with any such carrier, nor do they render any transportation-connected or accessorial services for such carriers to induce any movement of traffic over carriers' lines. The appellees are shippers or the agents of shippers and Congress did not intend to regulate them.

## III.

On the whole record before the Commission, after its abortive hearings of December 9th and 10, 1942, there was no evidence upon which it could conclude it had jurisdiction of appellees and its order of May 18, 1943 is void for want of power to issue it. Moreover, there was no fair hearing accorded appellees and the order is void for want of due process of law.

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## I.

**The determination of appellees' status by the order of August 21, 1942 should be set aside.**

The Court below improperly denied respondents' plea to set aside the order of August 21, 1942. While that order is in the nature of a mere notice of hearing within the doctrine of *United States* v. *Illinois Central R. R. Co.* (1917), 244 U. S. 82, 89, and *United States* v. *Los Angeles & S. L. R. R. Co.* (1927), 273 U. S. 299, 309, it is also an administrative finding or conclusion of law that the Commission has jurisdiction of respondents, made without notice or hearing, and based upon no evidence or facts before the Commission establishing that respondents are engaged in forwarding "in connection with a common carrier by water" within the meaning of 46 U. S. Code 801—a fact prerequisite to such jurisdiction. It is thus void for want of due process of law under the authority of *St. Joseph Stock Yards Co.* v. *United States* (1936) 298 U. S. 38, 73, 74; *United States* v. *Abilene and S. Ry. Co.* (1924) 265 U. S. 274, 286-290; *Interstate Commerce Commission* v. *Louisville & N. R.R. Co.*, 227 U. S. 88, 91, 92. Moreover, no findings of fact of a "carrier connection" of respondents were made to support the legal conclusion (*State of Florida* v. *United States* [1931] 282 U. S. 194, 212, 215)—such finding would seem to be required by Sec.

tion 23 of the Shipping Act (1916) (46 U. S. Code 822);[4] and there was not only no substantial evidence before the Commission, but no evidence whatever, and accordingly no warrant in the record or reasonable basis in the law for the Commission to conclude it had jurisdiction (*National Labor Relations Board* v. *Hearst Publications, Inc.* [1944], 322 U. S. 111, at 131; *The New England Division* case [1923] 261 U. S. 184, 203; *The Chicago Junction* case [1924], 264 U. S. 258, 265-266).

As to the factual basis of the Commission's *ex parte* determination of the appellees' status as persons subject to the Act, it is patent that the persons named as respondents in the August 21, 1942 order, were selected either from the classified telephone directory or by some other equally random procedure. Many so named were dead and some out of business (R. 16) and the Commission added and eliminated names of persons alleged to be subject to its jurisdiction at its caprice (R. 16, 17, 18).[5]

Had the order of August 21, 1942 been challenged when issued and before the Commission brought respondents within the ambit of regulation by the orders of January 14th and May 18, 1943, this Court would probably decline to review it. *Rochester Telephone Corp.* v. *United States* (1939), 307 U. S. 125, 130; *United States* v. *Illinois Central R. R. Co.*, 244 U. S. 82, 89, since its operation was then contingent upon future administrative action; re-

4. The section reads in part:

"Orders of the Commission relating to any violation of this chapter shall be made only after full hearing, and upon a sworn complaint or in proceedings instituted of its own motion. * * *"

5. The *ex parte* recitals in the supplemental orders First, Second, and Third are (R. 16, 17):

"It appearing further, That, due to recent discontinuances in business, changes in names, and for other reasons, certain respondents named in the Commission's order of August 21, 1942, are no longer in fact responsive as respondents in this proceeding concerned; * * *"

spondents were not constrained thereby; and it was an interim step in the proceeding.

When, however, subsequent administrative action was taken and the orders of January 14th and May 18, 1943, were issued, the initial order of August, 1942, ceased to be a mere abstract declaration of the respondents' status—penalties for disobedience were imposed[6]—and it became an integral part of a scheme of positive regulation.

Under such circumstances, this Court did not hesitate to review the initial determination of jurisdiction in either *Shields* v. *Utah Idaho Central R. R. Co.* (1938), 305 U. S. 177, or *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125.

In the *Shields* case, the initial determination of the Interstate Commerce Commission, that the carrier was not an interurban electric railway within the meaning of the Railway Labor Act (45 U. S. Code 151, *et seq.*) was clearly not subject to review when made. When, however, the mediation board directed the posting of notices, the disobedience to which entailed criminal penalties, and the railroad sued to enjoin prosecution, this Court reviewed the entire record for the purpose of ascertaining at least (p. 185) "whether the Commission had acted within its authority" (p. 182) whether the hearing held conformed to the requirements of due process of law, and (p. 185) "whether the Commission in arriving at its determination departed from the applicable rules of law and whether its finding had a basis in substantial evidence or was arbitrary and capricious. *Id.* That question,"

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6. Section 21 of the Shipping Act (1916) (46 U. S. Code 820) provides in part:

> "The Commission may require any common carrier by water, or other person subject to this chapter, * * * to file with it any periodical or special report * * * appertaining to the business of such carrier or other person subject to this chapter. * * * Whoever fails to file any report, account, record, rate, charge, or memorandum as required by this section shall forfeit to the United States the sum of $100 for each day of such default. * * * "

said the Court "must be determined upon the evidence produced before the Commission."

We suggest that this Court here accord the same character and scope of review to the Commission's order of August 21, 1942, and since it was made *ex parte*, without notice or hearing, or evidence or argument, and without any attempt to comply with the requirements of due process of law, or intent to ascertain the fundamental fact of appellees' carrier connections, that it be set aside as arbitrary and capricious.

In the *Rochester Telephone* case, *supra*, this Court, once it became clear that the determination of the corporation's status by the Communications Commission (p. 144) "carried direction of obedience to previously formulated mandatory orders" reviewed the proceedings in which the jurisdictional status was determined. The scope of the review is narrow, it is true, but it comprehends all that we ask to have reviewed here, that is to say:

> "* * * questions affecting constitutional power, statutory authority and the basic prerequisites of proof * * *."[7]

Since all these are lacking here, the predicate of action by the Commission is wanting and the order of August 21, 1942 must fall. Errors of law, substantive or procedural, are sufficient to invalidate an administrative act. *Interstate Commerce Commission* v. *Union Pacific R. R. Co.* (1912), 222 U. S. 541, 547; *Skinner & Eddy Corp.* v. *United States* (1919), 249 U. S. 557, 562.

Whether or not the Commission shall proceed anew in a correct manner is a question not now before this Court, but it is clear that in such proceeding, it should be limited to inquiries concerning the facts of appellees' "carrier connection", *i. e.*, it should establish a solid basis of ju-

7. The Court prescribed these limitations to the scope of the review, 307 U. S. at p. 140.

risdiction before proceeding to issue regulatory orders. On this phase of the discussion, however, it will be noted, as we see in Point II hereof, that the Commission has nothing further to offer on this subject. By its stipulation (R. 117) for final judgment on the same record on which the District Court decided the preliminary motions, the Commission admits the "independent" character of appellees, and that as to their "carrier connection", there are no further facts to be elicited.

However, irrespective of what may be done *in futuro*, we assert now that the order of August 21, 1942, is void for want of procedural due process of law, and that it should be set aside.

## II.

**The appellees are not "other persons subject to the Act" and there was no evidence before the Commission to establish that they were.**

The Commission has jurisdiction to compel the appellees to file reports under Section 21 of the Act (46 U. S. Code 820) only if they are other persons subject to the Act; and they are such other persons only if engaged in "forwarding * * * in connection with a common carrier by water." It is clear that there was no evidence of this fact before the Commission to support its ultimate conclusion of jurisdiction when the order of August 21, 1942 was made. It remains to be seen whether on the whole record before it, after the abortive hearings of December 9th and 10, 1942, there was any such evidence upon which it could legally issue the order of May 18, 1943, to which appellees were required to respond. We must first consider what the statute means by the term "business of forwarding in connection with a common carrier by water."

At the outset of this point it should be observed that there are various categories of persons known as freight

forwarders. These are described in a recent report of the House Committee on Merchant Marine and Fisheries.[8] Generally, such forwarders as here act solely as agents of the shipper in the terminal areas at the Port of New York (R. 40) and have no "connection" of any sort with carriers other than those arising out of the contract of affreightment expressed in the bill of lading, taken on behalf of and in the name of the shippers, their principals, and no responsibility for carriage of merchandise.

The forwarding services of these appellees are not to be confused as analogous in foreign commerce to the type of domestic forwarding brought under regulation by Part IV of the Interstate Commerce Act (56 Stat. 284; 49 U. S. Code 1001, *et seq.*), where the so-called "forwarders" are common carriers. Even there, however, Congress excluded by definition domestic persons whose services, as in the case of appellees, "are confined to the terminal area in which such operations are performed" (49 U. S. Code 1002 [c] [2]).

This was alleged in the complaint (R. 2), the testimony of the Commission's sole witness, Harold C. Dow (R.

8. (House Report No. 1682, 77th Cong., 2nd Session):

"It was clear to the committee that the work of freight forwarding is essential to the movement of goods in foreign commerce under normal conditions. Large steamship companies maintain their own forwarding organizations. Manufacturers and suppliers with a large export business maintain forwarding facilities within their organizations. Exporters and importers without their own forwarding facilities usually make use of the facilities of steamship companies. But a large number of transactions involving smaller consignments are handled by independent foreign freight forwarders and custom-house brokers. The existence of these groups protects the public from combinations and preferences that might follow if the only forwarding organizations were to be found with the steamship companies. In general, it may be said that these forwarders render administrative services such as routing arrangements and the preparation of documents, and they supply brokerage services predicated upon the development of export business and the furnishing of cargo for steamship companies.

The freight forwarders and licensed custom brokers, in the opinion of your committee, are necessary and vital agencies in the promotion of an American merchant marine, to such an extent that if they should be eliminated and the business formerly done by them should be done only by the representatives of their competitors, the future of the American merchant marine in the post-emergency period will be precarious in the extreme. * * *"

54-55),[9] affirmed by the affidavit of Herbert A. Byrnes (R. 39-41), and is consistent with judicial definition of the term "forwarder" (*Place* v. *Union Express Co.*, 2 Barb. 19, 25 [New York, 1858]; *In re Emerson, Marlow & Co.*, 199 Fed. 95, 98 [C. C. A. 7th] [1912]).

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9. *By the Commission's Counsel:*

"Q. Would you be good enough to detail for us, if you will, briefly, the general nature of the freight forwarding business; foreign freight forwarding business? A. Well, the foreign freight forwarding business has been in existence for approximately 100 years, and is an export shipping medium that is used by almost all export shippers. And the forwarders maintain offices at all ports, and their duties are arranging the necessary space with the steamship companies, and obtaining permit for the acceptances of the freight at piers, and from time to time it is necessary for the forwarder to arrange suitable storage space for the shipment until the steamers are available, or for other causes. Also the forwarder is obligated to check the marks on shipping papers and containers to be certain that they are in accordance with the regulations prescribed by the country to which the shipment is destined.

Also, if the containers are damaged, the forwarder sees that they are recoopered. If the material in the containers is found to be damaged en route to seaboard, the forwarder notifies the insurance company so that an inspection may be made to ascertain the extent of the damage. A forwarder must attend to the procurement when requested of all needful Government documents, such as export licenses, preference rating certificates, BEW space applications, ODT permits AAR permits, and comply with such other regulations as may from time to time be announced. These practices, of course, are necessary, due to wartime procedures at the present time.

A forwarder traces and follows up shipments and instructs common carriers, truckmen, or suppliers to effect delivery to piers, warehouses, terminals, or other places as required. Perhaps and clear through the Customs House export declarations, and prepare ocean bills of lading, drafts, consular papers, and other documents necessary to comply with the regulations of the country of destination.

Convert weights and measurements into metric system when necessary. Arrange for insurance protection on the freight. Forward all necessary documents to consignee and/or banks or other parties, as instructed by exporter. Check supplier's individual weights and measurements against steamship lines' assessments and reconcile them when necessary; advance all necessary freight charges and/or other expenses incurred on the shipment in behalf of the exporter.

The forwarder must keep a complete record of all shipments dispatched for the convenience of the exporter and prosecute such claims as may be required by the exporter against carriers, insurance companies and/or other parties at interest.

The forwarder in normal times has up to the minute sailing schedules and keeps in constant touch with the steamship company to ascertain if any substitutes are made in the steamer name or changes in scheduled ports of call. These are most of the duties accomplished by the freight forwarder.

Q. Would you say, then, in short, that the freight forwarder is a sort of representative of the exporter or shipper?: A. Yes, sir.

Q. And performs generally the functions that the shipper would ordinarily have to perform in order to see that the goods arrive at destination? A. Yes, sir."

Moreover, in the posture of the case as it reaches this Court, the appellant concedes [10] that appellees are "independent freight forwarders" and argues that, without more, the statute is applicable to them as such. That is to say, that Congress intended to bring within the ambit of regulation any person whose business it is to put foreign freight in way of dispatch under private arrangements with shippers, although an entire stranger to the carrier. This was also the apparent view of the Commission, which made no inquiry during the hearings and only one in its questionnaires as to the association, affiliation, or relationship, contractual or otherwise, of the appellees with any water carrier.[11] Although the Commission's Director of Regulation seems to concede that there may be forwarders not within the definition of the Act[12] and that the Commission is without power to issue orders until their business is defined (R. 75), it would be difficult to say who they might be, if the most independent category of such persons is to be included within the definition.

Under the Commission's construction of the statute, the words "in connection with a common carrier", are not words of limitation, are without significance, and the statute is to be construed as if it read "carrying on the business of forwarding in foreign commerce."[13]

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10. Pages 22, 30 of appellant's brief.

11. See Note 1, *ante*, page 5 hereof.

12. Before the House Committee on Small Business, Mr. Hallett testified in response to a question from the Chair as follows (R. 95):

> "The Chairman: Do you not think it would be helpful to everybody if we could attempt somehow to accomplish a definition of that term (forwarder) so that everyone would understand it?
>
> Mr. Hallett: With all due deference, I don't know whether we could do it at this particular place and time. The Court undoubtedly has to consider this matter because if they are not engaged in the forwarding described in the Act then we have no jurisdiction."

This was approximately one year after the official finding of jurisdiction in the August 21, 1942 order.

13. This is the way the Enforcement Division of the Commission thought the statute read. In the original order of August 21, 1942, the Commission "found" that the appellees and others "carry on the business of forwarding in foreign commerce" and are "an other person subject to this Act" (R. 11). The phrase was repeated in the first supplemental order (R. 15), in the second supplemental order (R. 16); and in the third supplemental order (R. 17), as the basis of the Commission's jurisdiction.

A similar phrase, however, had long appeared in the Interstate Commerce Act[14] which had been in force a generation when the Shipping Act of 1916 was passed, and similar terms in both Acts are to be similarly construed. *United States Navigation Co.* v. *Cunard S.S. Co.* (1932), 284 U. S. 474, 481.[15]

The phrase is a term of art. The words "in connection with any railroad" and "connected with such transportation" both appear in the Interstate Commerce Act. Section 1 (3), (49 U. S. Code 1 [3]) reads in part:

> "* * * The term 'railroad' as used in this chapter shall include all bridges, carfloats, lighters, and ferries used by or operated in connection with any railroad, * * *. The term 'transportation' shall include * * * and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported. * * *"

Section 15 (13) (49 U. S. Code 15 [13]) reads in part:

> "If the owner of property transported under this chapter directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, * * *,"

he shall receive an allowance from the carrier.

These phrases have uniformly been construed to mean only such equipment as is used by the railroad as part of its transportation facilities or services constituting a part of the transportation service rendered by the carrier.

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14. Section 1 (3) (49 U. S. Code 1 [3]); Section 15 (13) (49 U. S. Code 15 [13]).

15. In the *Cunard S. S. Co.* case, the Court said (at p. 481):

> "In this situation, the Shipping Act was passed. In its general scope and purpose, as well as in its terms that Act closely parallels the Interstate Commerce Act; and we cannot escape the conclusion that Congress intended that the two Acts, each in its own field, should have like interpretation, application and effect."

Such construction is consonant with the purpose and intent of both the Interstate Commerce Act and the Shipping Act, under both of which the incidence of regulation is upon the carrier and those who act with it, in such manner as to occasion discrimination. The evil of discrimination was the principal thing aimed at by both Acts (*Louisville and Nashville R. R. Co.* v. *United States* [1915], 238 U. S. 1, 8; *Merchants' Warehouse Co.* v. *United States* [1931], 283 U. S. 501, 512), and it is trite at this late date to observe that such discrimination may arise either by the rendition of the same service for a different rate, or by the assessment of the same rate for a different service.

To insure uniformity of both rates and service, the Interstate Commerce Act requires that if a service be performed by a carrier for one shipper, it must be performed for all shippers at the same rate (*Louisville and Nashville R. R. Co.* v. *United States, supra*); that if a shipper performs services "connected with such transportation", the carrier may and must pay for it (*Interstate Commerce Commission* v. *Diffenbaugh* [1911], 222 U. S. 42, 46;[16] *Union Pacific R. R. Co.* v. *Updike Grain Co.* [1911], 222 U. S. 215), in which cases the carrier was required to compensate the shipper for the elevation of grain in transit because the elevation was "connected with such transportation", within the meaning of the Act.

Other examples, such as the pre-cooling of refrigerator cars and icing of perishable produce in transit (*Atchison, Topeka, & Santa Fe Ry. Co.* v. *United States* [1914], 232 U. S. 199); the dipping of cattle in transit under quarantine laws (*Missouri, Kansas, & Texas Ry. Co.* v. *Skinner*

16. The Court, in the *Diffenbaugh* case (222 U. S. at p. 46; said:

"As the carrier is required to furnish this part of the transportation upon request, he could not be required to do it at his own expense, and there is nothing to prevent his hiring the instrumentality instead of owning it."

(Cited with approval in *United States* v. *Baltimore & Ohio R. R. Co.*, 231 U. S. 274, p. 285.)

[1916], 61 Okla. 189; 160 Pac. 875) might be cited, but the principle is one of familiar application requiring no elaboration.

Conversely, if the service is not "connected with" such transportation, *i. e.*, part of the service which the carrier is required to furnish under the tariffs at its published rates, it may not compensate the shipper therefor. Thus, a carrier may not pay for lighterage service rendered by a shipper outside the free lighterage limits of New York Harbor (*United States* v. *Baltimore & Ohio R.R. Co.* [1913], 231 U. S. 274) "since the railroads are under no obligation to lighter the sugar", (*idem*) but may so compensate a shipper if such service is within the lighterage limits. A carrier may not make allowance for carting beer from its terminal to the consignee's warehouse (*Wight* v. *United States* [1897], 167 U. S. 512); nor for switching within an industrial plant after delivery since "no allowance is due for service * * * after delivery has been made and transportation is at an end" (*The New York Central and H. R.R. Co.* v. *Gen. Elect. Co.*, 219 N. Y. 227, 234, 235; cert. den. 243 U. S. 636).

Here again, the principle requires no elaboration of authorities, it being plain that what is "connected with such transportation" may be compensated for, and what is not so "connected" may not be; and equally clear that what is "connected with transportation" is that which "the carrier is required to furnish."[17] The statutory provision so construed prevents a departure from the published rates, indirect rebates, and the discrimination effected thereby. The question, therefore, poses itself as to whether independent forwarding of the character at bar is transportation-connected. This Court has said specifically that it is not, and if connection with the carrier means connection with transportation, the appellees are excluded from the statute.

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17. See note 16 *ante* (*Interstate Commerce Commission* v. *Diffenbaugh*, 222 U. S. 42).

In *Lehigh Valley R. R. Co.* v. *United States* (1917), 243 U. S. 444, this Court considered the propriety of payments made by a rail carrier to Sheldon and Company, an independent forwarder or shippers' agent of the same type as appellees. It was argued that such compensation was lawful under Section 15 of the Act because connected with the transportation. The Court, per Mr. Justice Holmes, said:

> "The services rendered by George W. Sheldon & Company, although in a practical sense 'connected with such transportation,' were not connected with it as a necessary part of the carriage,—were not 'transportation service,' in the language of *Union P. R. Co.* v. *Updike Grain Co.*, 222 U. S. 215, 220, 56 L. ed. 171, 173, 32 Sup. Ct. Rep. 39,—and, in our opinion, were not such services as were contemplated in the Act of June 29, 1906, chap. 3591, §4, 34 Stat. at L. 589, Comp. Stat. 1913, §8583, amending §15 of the original act. On the other hand, the allowance for them falls within the plain meaning of §2 of the Act of 1906, to which we referred above."

Since such forwarding was held not to be connected with the transportation because not a part of the carrier's services, it follows by analogy that the appellees are not within the definition of the Shipping Act,[18] but the phrases in the two statutes do not have identical words,—what then is meant by the term "connected with a common carrier" as distinct from "connection with transportation"?

We have already seen that "rates" and "services" are correlative factors and that a variance of either works

18. It appears plain that had Sheldon's contract been with a common carrier by water, he would have been forwarding in connection with such common carrier and within the meaning of Section 1 of the Shipping Act. It also appears plain that appellees are not within; unless they can be shown to have similar carrier connection.

a prohibited discrimination. But discrimination may be subtler, and in the competitive race for traffic, a carrier may extend a "non-transportation facility" to favored shippers to induce a movement of merchandise over its line. These facilities, sometimes called "carrier connected", "affiliated", or "accessorial", may be furnished by the carrier free,[19] or at non-compensatory rates,[20] or by a subsidiary or lessee of the carrier, or by financing structures in which carriers lease space from their own subsidiaries, or by other expedients. But in all cases where the carriers exercise sufficient control to make the facilities subservient to the competitive needs of the carriers, such facilities are said to be "in connection with accessorial services of the carriers."[21]

This, we think, is precisely what the Shipping Act means. It brings within the ambit of regulation those "engaged in the business of forwarding in connection with (or as accessorial services of) a common carrier by water." It is only where forwarding is so "carrier connected" or "affiliated", or "accessorial" under some continuing contractual[22] or other relationship with the carrier, analogous to the warehousing services condemned in *Baltimore & Ohio R. R. Co.* v. *United States* (1939), 305 U. S. 507, and *Merchants Warehouse Co.* v. *United States*, 283 U. S. 501, that the Shipping Act applies.

In the *Baltimore & Ohio* case, this Court sustained an order of the Interstate Commerce Commission, directing

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19. See the *Merchants' Warehouse* case, *post*.

20. See *Baltimore & Ohio R. R.* case, *post*.

21. *Baltimore & Ohio R. R. Co.* v. *United States*, 305 U. S. 507, at p. 516.

22. Section 15 of the Act (46 U. S. Code 814) contemplates a contractual relationship between the carrier and such other person. It requires other persons subject to this chapter to file with the Commission:

> "* * * every agreement with another such carrier or other person subject to this chapter * * * fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; * * *"

the carriers to cease and desist[23] "from permitting shippers in Interstate Commerce over the carrier's lines from occupying space by lease or otherwise in warehouses, buildings, or on piers, owned or controlled directly or indirectly, by, or affiliated with the carriers" at non-compensatory rates. Such services, although forming no part of the transportation, were condemned as discriminatory, because they were connected, not with the transportation, but with the carrier.[24]

Had such services been rendered by independent warehousemen for the shippers under private contracts, at shippers' expense, divorced from all carrier association, the Commission would have had no jurisdiction of the matter and, indeed, it was in part upon the complaint of discrimination made by such private warehousemen that the carrier's practices were condemned.

*Merchants' Warehouse Co.* v. *United States*, 283 U. S. 501, completes for our purposes the identification of carrier connected forwarding and accessorial carrier services.

In that case, certain rail carriers contracted with private warehousemen to furnish free to shippers over their lines the service of distributing and assembling carload lots of package freight which the carriers were not authorized or permitted to do. In holding that the furnishing of such accessorial services constituted a rebate under Sections 2 and 3 of the Interstate Commerce Act, the Court assimilated such warehousing services to the for-

23. See 305 U. S. at p. 513.

24. "The warehousing practices complained of", said the Court (p. 516), "are those in connection with accessorial services of the carriers, accurately designated commercial warehousing. Examples of such services are the storage and other warehousing services furnished by the carriers or their affiliates or subsidiaries, to enable shippers to hold and handle their commodities beyond the time allowed by transportation rates and in ways not required by rail movement itself."

The warehousing facilities were (p. 517) "* * * subservient to the competitive needs of the carriers" and furnished to induce shippers to use particular rail facilities.

warding performed by Sheldon in *Lehigh Valley R. R. Co. v. United States, supra.* It said (p. 512):

> "In point of substance the warehousemen were consignors and consignees of merchandise, and they alone could act as such in the case of carload shipments which they assembled or distributed. In this respect they do not differ from freight forwarders who render a like service so far as concerns their relations with carriers. *Lehigh Valley R. R. v. United States*, 243 U. S. 444."

Enough has been said to indicate that independent forwarding is not "transportation connected" because not part of the transportation, and that it is not "carrier connected" unless furnished as an accessorial service of a water carrier, and that only then can it be discriminatory. This, indeed, was the view taken by the Maritime Commission *In Re Gulf Brokerage & Forwarding Agreements* (1936), 1 U. S. M. C. 533,[25] where the Commission, to prevent discrimination, refused to approve ninety-two agreements filed with it for the purpose of fixing "the amount of the charges to be collected from shippers for forwarding services to be performed by the carriers and such other persons (forwarders)". It was the connection, association, or conjunctive relation between the carrier and the forwarder which led the Commission to condemn the character of the arrangement there presented to it. Indeed, the discrimination was identical with that implicit

25. The Commission there said (p. 534):

> "Such services are described as including 'whatever is required to arrange the delivery from the inland carrier to the custody of the ocean carrier when the rail rate or charge as collected by the inland carrier does not cover that particular service.' Some of the services referred to in the record * * * are of a character which cannot properly be performed by common carriers."

As in the *Baltimore & Ohio R. R.* case, *supra*, the carrier connected forwarder was to render services which could not "properly be performed by common carriers", *i. e.*, accessorial non-transportation services.

in the *Baltimore & Ohio* case. There the carrier's "entrance into warehousing was brought about by a desire to induce shippers to use particular rail facilities:",[26] and in the *Gulf Brokerage and Forwarding Agreements* case, the Maritime Commission, apprehending that like discrimination would result under the proposed carrier-forwarder agreement, frowned upon it in advance:[27]

The appellant cites *State of California v. United States* (1944), 320 U. S. 577, in its favor, but we think that case supports the appellees' views. The facilities there regulated were, if not essentially part of the transportation, at least accessorial to it, and some of the charges there collected for wharf use and storage, have under the Interstate Commerce Act, been held to be actually part of transportation. In that case, the District Court described the operation (46 F. Supp. 474, 477):

> "The Board assigns pier space to the various steamship lines, giving them a preferential use of the piers, for which it charges a rental. It also collects dockage on vessels and tolls on cargo, as well as demurrage and storage charges. All revenues from handling, loading, and accessorial services are collected and retained by the assignees."

It would be difficult to find a better example of carrier connection. Storage after tender of delivery by a rail carrier "is undoubtedly a terminal service forming a part of the 'transportation' ". *Southern Ry. Co. v. Prescott* (1916), 240 U. S. 632; and so, by analogy, is dock storage after delivery from shipside; *a fortiori*, where

26. 305 U. S. at p. 517.

27. The Commission said (1 U. S. M. C. at p. 535):

> "* * * the Department will not approve agreements under which the forwarder, whether also a broker or not, would refuse to handle as a forwarder shipments as to which routing by a competing carrier has been specified by the shipper."

the carrier retains the revenue. Demurrage is in a like class (*Emmons Coal Mining Co. v. Norfolk & Western Ry. Co.* [1927], 272 U. S. 709; cf. *Turner Dennis and Lowry Lumber Co. v. Chicago Milwaukee & St. Paul Ry. Co.* [1926] 271 U. S. 259) and a public wharf operated by a steamship company has been held to be operated "in connection with its business of a common carrier" (*Northern Commercial Co. v. United States* [1914] [C. C. A. 9th] 217 Fed. 30, 32).

In conclusion, we say that the forwarding of the appellees is neither carrier nor transportation connected nor accessorial to the carrier's service. Appellees are only shippers, for the agent of the principal is in law, the principal; and it was not the intent of Congress to regulate shippers or their servants; but only carriers and their servants.

## III.

**There was no evidence before the Commission on the whole record to show carrier connection of appellees and its action was wanting in due process of law.**

Under Section 23 of the Shipping Act (46 U. S. Code 822)[28] orders may be made by the Commission "only after full hearing" and then, under familiar principles of law, only if there is some evidence in the record to sustain its findings and order, for an order without findings (*State of Florida v. United States*, 282 U. S. 194) or a finding without evidence is void (*St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38; *United States v. Abilene and S. Ry. Co.*, 265 U. S. 274). In this case there was no

28. "Orders of the commission relating to any violation of this chapter shall be made only after full hearing, and upon a sworn complaint or in proceedings instituted of its own motion. * * *"

Cf. §15 (2) Interstate Commerce Act (49 U. S. Code 15 [2]).

hearing and no intent of holding one,[29] to determine the carrier connection of the appellees before the order of May 18, 1943 was issued. We say, therefore, that it is void, since it was the duty of the Commission to inquire of each appellee whether it was carrier connected before subjecting it to the penalties involved for disobedience to that order.[30] It was, moreover, the duty of the Commission to give each appellee an opportunity to be heard on the subject without abortively adjourning the hearings and preemptorily issuing its mandate.

The answer to question 2 of the preliminary questionnaire (R. 32, 136), wherein the appellees are said to have admitted their carrier connection, was the only "evidence" of such connection before the Commission when it issued its order of May 18, 1943. This is not enough to establish the Commission's jurisdiction, particularly when contradicted by the facts.[31] What the Act requires is a "full hearing"[32] and knowledge of the purpose of it, for, as this Court said in *Morgan, et al.* v. *United States* (1938) 304 U. S. 1, 18:

> "The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them."

29. None of the questions propounded in the questionnaires of January 21, 1943 (R. 23) or of May 18, 1943 (R. 28, 29) sought to elicit information as to the appellees' relation with any carrier. They probed only the relationship between the appellees and their customers.

30. Of course, the apt procedure for the Commission to have followed was to have issued a Section 21 order to the carriers under its jurisdiction, requiring them to report their forwarder connections, if any.

31. We pass, as unworthy of comment the statement of Commission's counsel that it had four letterheads of appellees in its files (R. 32).

32. In *Interstate Commerce Commission* v. *Louisville & Nashville R. R. Co.*, 227 U. S. 88, the Court said:

> "All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents, and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense. In no other way can it test the sufficiency of the facts to support the finding; * * *."

The appellees had no such knowledge when they answered the preliminary questionnaire, and it is doubtful if the requirements of due process of law are satisfied by the expedient of securing an answer to such a document, the meaning and intent of which was unexplained. Such a covert procedure seems to fall short of the essentials of a fair hearing specified in the concurring opinion of Brandeis, *J.*, in *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38, 73.[33]

Moreover, the answer at best was a conclusion of law made by laymen, contradicted by the negative answer given by them to question No. 33 (R. 137) and by the testimony of the Commission's sole witness (R. 54, 55).[34] The Court below, accordingly, quite properly concluded that the evidence "contradicts the admission made by said affirmative answer" (R. 129).

If, therefore, appellees' interpretation of the statute is a correct one and "carrier connection" implies a closer relationship than that growing out of the mere issuance of a bill of lading, there was no evidence of any kind before the Maritime Commission upon which it could conclude that the appellees are "other persons subject to this Act". The order is accordingly arbitrary, capricious, and void. *Interstate Commerce Commission* v. *Louisville & Nashville R. R. Co.* (1913), 227 U. S. 88, 91, 92;[35] *The Chicago Junction* case, 264 U. S. 258, 264, 265, note 9 and

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33. "The inexorable safeguard which the due process clause assures is, * * * that the trier of the facts shall be an impartial tribunal; that no finding shall be made except upon due notice and opportunity to be heard; that the procedure at the hearing shall be consistent with the essentials of a fair trial; and that it shall be conducted in such a way that there will be opportunity for a court to determine whether the applicable rules of law and procedure were observed."

34. See note 9, *supra*, where the testimony is quoted in full.

35. In that case, the Court said (p. 91):

"* * * it has been distinctly recognized that administrative orders, quasi judicial in character, are void if a hearing was denied; if that granted was inadequate or manifestly unfair; if the finding was contrary to the 'indisputable character of the evidence'."

cases there cited,[36] and bought in the language of the statute, to be set aside by a court of competent jurisdiction.[37]

It, of course, goes without argument that if the appellees are not on the record "other persons subject to this Act", that the Commission has exceeded its statutory powers, and that the order is void. *Skinner & Eddy Corp. v. United States*, 249 U. S. 557, 562, 563.

## Conclusion.

For the reasons above stated, it is respectfully submitted that the decision of the Court below, setting aside and enjoining the enforcement of the order of May 18, 1943, be sustained; that this Court review the antecedent proceedings wherein the statute of the appellees as subject to the jurisdiction of the Maritime Commission was determined, and hold the said proceeding as void for want of due process of law, and that this Court hold that appellees are not "other persons" subject to the Shipping Act, 1916.

HAROLD L. ALLEN,
*Attorney for the Appellees.*

36. In the *Chicago Junction* case, the Court said (p. 265):
"To refuse to consider evidence introduced or to make an essential finding without supporting evidence is arbitrary action."

37. Section 23 Shipping Act, 1916 (46 U. S. Code 822); cf. Section 15 (2) Interstate Commerce Act (49 U. S. Code 15 [2]).

## APPENDIX.

The Shipping Act of 1916, as amended (39 Stat. 728, 46 U. S. Code 801, *et seq.*), provides in part as follows:

Section 1 (46 U. S. Code 801):

When used in this chapter:

The term "common carrier by water in foreign commerce" means a common carrier, except ferryboats running on regular routes, engaged in the transportation by water of passengers or property between the United States or any of its Districts, Territories, or possessions and a foreign country, whether in the import or export trade: *Provided*, That a cargo boat commonly called an ocean tramp shall not be deemed such "common carrier by water in foreign commerce".

The term "common carrier by water in interstate commerce" means a common carrier engaged in the transportation by water of passengers or property on the high seas or the Great Lakes on regular routes from port to port between one State, Territory, District, or possession of the United States and any other State, Territory, District, or possession of the United States, or between places in the same Territory, District, or possession.

The term "common carrier by water" means a common carrier by water in foreign commerce or a common carrier by water in interstate commerce on the high seas or the Great Lakes on regular routes from port to port.

The term "other person subject to this Act" means any person not included in the term "common carrier by water", carrying on the business of forwarding or furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water.

The term "person" includes corporations, partnerships, and associations, existing under or authorized by

the laws of the United States, or any State, Territory, District, or possession thereof, or of any foreign country.

The term "vessel" includes all water craft and other artificial contrivances of whatever description and at whatever stage of construction, whether on the stocks or launched, which are used or are capable of being or are intended to be used as a means of transportation on water.

The term "documented under the laws of the United States", means "registered, enrolled, or licensed under the laws of the United States".

Section 15 (46 U. S. Code 814):

Every common carrier by water, or other person subject to this chapter, shall file immediately with the commission a true copy, or, if oral, a true and complete memorandum, of every agreement, with another such carrier or other person subject to this chapter, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

The commission may by order disapprove, cancel, or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or be-

tween exporters from the United States and their foreign competitors or to operate to the detriment of the commerce of the United States, or to be in violation of this chapter, and shall approve all other agreements, modifications, or cancellations.

Agreements existing at the time of the organization of the commission shall be lawful until disapproved by the commission. It shall be unlawful to carry out any agreement or any portion thereof disapproved by the commission.

All agreements, modifications, or cancellations made after the organization of the commission shall be lawful only when and as long as approved by the commission, and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation.

Every agreement, modification, or cancellation lawful under this section shall be excepted from the provisions of sections 1-11 and 15 of Title 15, and amendments and Acts supplementary thereto.

Whoever violates any provision of this section shall be liable to a penalty of $1,000 for each day such violation continues, to be recovered by the United States in a civil action.

Section 21 (46 U. S. Code 820):

The commission may require any common carrier by water, or other person subject to this chapter, or any officer, receiver, trustee, lessee, agent, or employee thereof, to file with it any periodical or special report, or any account, record, rate, or charge, or any memorandum of any facts and transactions appertaining to the business of such carrier or other person subject to this chapter. Such report, account, record, rate, charge, or memorandum shall be under oath whenever the board so requires, and shall be furnished in the form and within the time

prescribed by the commission. Whoever fails to file any report, account, record, rate, charge, or memorandum as required by this section shall forfeit to the United States the sum of $100 for each day of such default.

Whoever wilfully falsifies, destroys, mutilates, or alters any such report, account, record, rate, charge, or memorandum, or wilfully files a false report, account, record, rate, charge, or memorandum shall be guilty of a misdemeanor, and subject upon conviction to a fine of not more than $1,000, or imprisonment for not more than one year, or to both such fine and imprisonment.

Section 23 (46 U. S. Code 822):

Orders of the commission relating to any violation of this chapter shall be made only after full hearing, and upon a sworn complaint or in proceedings instituted of its own motion.

All orders of the United States Maritime Commission, other than for the payment of money, made under this chapter, as amended or supplemented, shall continue in force until its further order, or for a specified period of time, as shall be prescribed in the order, unless the same shall be suspended, or modified, or set aside by the Commission, or be suspended or set aside by a court of competent jurisdiction.

Section 31 (46 U. S. Code 830):

The venue and procedure in the courts of the United States in suits brought to enforce, suspend, or set aside, in whole or in part, any order of the commission shall, except as otherwise provided, be the same as in similar suits in regard to orders of the Interstate Commerce Commission, but such suits may also be maintained in any district court having jurisdiction of the parties.

# SUPREME COURT OF THE UNITED STATES.

No. 44.—October Term, 1945.

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| The United States of America, Appellant, vs. American Union Transport, Inc., D. C. Andrews & Co., Inc., Atlantic Forwarding Co., Inc., et al. | Appeal from the District Court of the United States for the Southern District of New York. |

[February 25, 1946.]

Mr. [redacted]ice Rutledge delivered the opinion of the Court.

The United States appeals from a decree entered by a District Court of three judges permanently enjoining enforcement of an order of the United States Maritime Commission. The order required the appellees and others to answer within thirty days a questionnaire concerning certain aspects of their business transacted during 1940, 1941 and 1942.[1] The central issue is whether appellees are within the coverage of the Shipping Act, 46 U. S. C. § 801, for this purpose.

On August 21, 1942, the Commission, upon its own motion, ordered an investigation concerning the lawfulness of the rules, regulations, practices and operations of named persons and firms, described as carrying on "the business of forwarding in foreign commerce." The order stated that from information before the Commission it appeared that a certain forwarding firm was engaging in practices which seemed to be in violation of § 17 of the Shipping Act, 46 U. S. C. § 816, and further "that the public interest requires a general inquiry to determine the extent of the said practices among all other forwarders in the port of New York subject to said Act, and the lawfulness of said practices under section 17 thereof . . . ."

Accordingly, the Commission sent to the persons and firms named a questionnaire containing the inquiry, among others, "Do you carry on the business of forwarding in connection with common

[1] See note 4. Jurisdiction rests on § 31 of the Shipping Act, 46 U. S. C. § 830; 28 U. S. C. §§ 47, 47a; 28 U. S. C. § 345(4). See California v. United States, 320 U. S. 577, 579.

carriers by water in foreign commerce?"[2] Each of the appellees answered this in the affirmative.[3] But negative answers were given to the question, "Is your company owned or controlled by or affiliated with any shippers for whom you act as forwarder or with any common carrier?"

In December, 1942, the Commission held public hearings before a trial examiner pursuant to the investigation order. On the second day the hearings were adjourned *sine die* so that the Commission might obtain additional information. They have not been resumed.

On January 14, 1943, the Commission entered an order, pursuant to § 21 of the Shipping Act, 46 U. S. C. § 820, directing appellees and others to answer a questionnaire relating to their forwarding operations in 1940, 1941 and 1942. The answers were to be filed within thirty days. Before this period expired appellees instituted this suit to enjoin the carrying out of that order and the general order of investigation. Thereafter the Commission extended the time for answering the questionnaire, and on May 18, 1943, withdrew its order of January 14, issuing instead another under § 21. This order, like the earlier one, required the appellees to answer a questionnaire concerning their forwarding operations. The only difference, apparently, was that the information sought was somewhat more extensive. The parties agreed that the suit should be continued as against the order of May 18 without formal amendment of the complaint.

On November 30, 1943, the District Court denied the Commission's motion for summary judgment and granted a temporary injunction restraining execution of the May 18, 1943, order. The injunction was made permanent on November 30, 1944.[4] The

[2] The inquiry was framed with reference to the statutory provision immediately in issue, namely, the definition of "other person subject to this Act" contained in § 1 of the Shipping Act, 46 U. S. C. § 801, set forth hereinafter in the text.

[3] In their complaint the appellees allege that the affirmative answers given were erroneous and were made "without knowledge of the import of the said question or of the kind or nature of the business which it was necessary to carry on, or the character of relationship with a common carrier by water in foreign commerce, which it was necessary to maintain, in order to fall within the said definition."

[4] The opinion of the District Court on motion for interlocutory injunction and on motion for reargument is reported in 55 F. Supp. 682. The opinion on final judgment, which was simply an adherence to the court's previous opinion, is not reported.

court held that the Maritime Comission had no jurisdiction over the appellees since, in its view, they did not come within the definition of the term "other persons subject to this Act" given in § 1 of the statute, 46 U. S. C. § 801. It refused, however, to enjoin the order of August 21, 1942, on the ground that it had no jurisdiction to annul an order which itself did not adversely affect the complaining parties.

The question we are to review is whether the appellees are included within the designation "other person subject to this Act" as that phrase is defined in § 1 of the Shipping Act. The definition reads: "The term 'other person subject to this Act' means any person not included in the term 'common carrier by water' carrying on the business of forwarding or furnishing wharfage, dock, warehouse, or other terminal facilities *in connection with* a common carrier by water." (Emphasis added.)

Substantially, the issue turns upon the meaning of "in connection with," that is, whether some relation of affiliation with the carrier is required, such as that exemplified in *Railroad Retirement Board* v. *Duquesne Warehouse Co.*, Nos. 95 and 103, this Term, decided January 2, 1946; or, on the other hand, the statutory phrasing is satisfied by the type of relationship illustrated by the companion cases of *California* v. *United States* and *City of Oakland* v. *United States*, 320 U. S. 577.[5]

If, as appellees contend, "in connection with" covers only forwarding businesses actually affiliated with a common carrier by water in a corporate sense, or under the control of or pursuant to a continuing contract with such a carrier, then plainly the Maritime Commission is without jurisdiction over these appellees, since none of them is controlled by or affiliated with a common carrier by water in any such manner. All are so-called independent forwarders and the case comes down to whether such forwarders are covered by the Act.

There is little or no dispute as to the nature of their business. They are primarily forwarders of freight, as that term is gen-

[5] The agencies found subject to the Act in these cases were public authorities. Although some continuing contractual relationship may have existed between the state wharfinger and the carriers in the *California* case, no such relation existed, except as to one pier, in the *Oakland* case, a fact of which the District Court in this case obviously was not informed, in view of its contrary statement. See note 17.

erally understood,[6] for transshipment in foreign commerce. The foreign freight forwarding business is a medium used by almost all export shippers. An exporter, intending to send goods abroad, consigns the merchandise to a forwarder who then makes all the arrangements for dispatching it to a foreign port. The forwarder must arrange for necessary space with the steamship companies, procure and prepare the many documents, obtain permits for the acceptance of freight at piers, and at times must find available storage space for the shipment until steamers are available. If requested to do so, a forwarder will secure whatever insurance is needed.

Forwarders also have many other incidental duties. They check the marks on shipping papers and containers in order to be certain that they are in accordance with the regulations of the country of destination. They convert weights and measurements into the metric system when necessary. They keep records, for the convenience of the exporter, of all shipments dispatched. They also prosecute such claims as may be required by the exporter against carriers, insurance companies, and any other parties in interest.

By engaging in these many activities of the forwarding business, independent forwarders—and particularly the appellees—act as agents of the shipper. They assume no responsibility for the transportation of goods.

We think the appellees are within the coverage of § 1. This conclusion is required not only by the broad and literal wording of the definition but also to make effective the scheme of regulation the statute established and by considerations of policy implicit in that scheme, as well as by the legislative history and the decision

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[6] See Place v. Union Express Co., 2 Hilt. (N. Y.) 19, 25; In re Emerson, Marlow & Co., 199 Fed. 95, 97; H. Rep. No. 1682, 77th Cong., 2d Sess., 5 *et seq.* Cf. the definition of "freight forwarder" in Part IV of the Interstate Commerce Act, 49 U. S. C. (Supp. IV) § 1002(a)(5), discussed at a later point in this opinion.

In addition to acting as freight forwarders, the appellees also act as freight brokers. And for their services as brokers they receive brokerage commissions or fees from the carrier with respect to the same shipments for which they act as forwarders.

In view of the disposition we make of the cause, we need not consider the argument made by the Government that in any case the appellees, because they also act as freight brokers and receive compensation from the carriers, come within the Maritime Commission's jurisdiction. Cf. In re Gulf Brokerage and Forwarding Agreements, 1 U. S. M. C. 533, 534, where it was said: "Brokers are not subject to the Shipping Act, 1916, and consequently agreements between carriers subject to that act and brokers are not of the character required to be filed within section 15 thereof."

in the *California* and *Oakland* cases, *supra*. In order to place the discussion of our reasons in statutory as well as factual setting, we sketch below some of the more pertinent statutory provisions. In doing so we shall emphasize the consequences of including or excluding so-called independent forwarders, like the appellees, for effective administration of the Act and achievement of its policy. But first we turn to the definition in § 1 itself.

The language is broad and general. No intent is suggested to classify forwarders, covering some but not others, just as none appears to divide persons "furnishing wharfage, dock, warehouse, or other terminal facilities" into regulated and unregulated groups. *California* v. *United States*; *Oakland* v. *United States*, *supra*. The absence of any such suggestion becomes highly significant by contrast with similar definitions of other statutes more or less related to the Shipping Act. In these Congress, when regulating carriers and "other persons," repeatedly has made plain the intent to cover only affiliates or other specially limited groups when this has been in fact its purpose.

Thus, in the legislation relating to railroads, forwarders were first covered expressly in 1942. 49 U. S. C. (Supp. IV) § 1002 (a)(5). The definition in shortened paraphrase is limited to any "person," other than a carrier, holding itself out "to transport or provide transportation" which "in the ordinary and usual course *of its undertaking*" (A) performs the usual functions of a forwarder, "*and* (B) assumes responsibility for the transportation of such property from point of receipt to point of destination, *and* (C) utilizes, for the whole or any part of the transportation of such shipments, the services of a carrier or carriers . . . ." (Emphasis added.) Not only would language so explicitly limited be difficult to apply to a person not performing any part of the "transportation service" proper, cf. *Lehigh Valley R. Co.* v. *United States*, 243 U. S. 444; but the very limitations, altogether absent from § 1 of the Shipping Act, forbid identical constructions of the two definitions. See also, in relation to the different treatment of rail forwarders, the correlated definition of "service subject to this chapter." 49 U. S. C. (Supp. IV) § 1002(a)(7).

The same difference applies with reference to the definitions of the term "employer" in the Railroad Retirement Act of 1937, 45 U. S. C. § 228a, and the Railroad Unemployment Insurance Act of

1938, 45 U. S. C. § 351, construed in *Railroad Retirement Board* v. *Duquesne Warehouse Co., supra.* In each instance the statute declares that "employer" shall mean "any carrier . . . and any company" carrier-owned or controlled "*and* which operates any equipment or facility or performs any service . . . in connection with the transportation of passengers or property . . .," thus plainly setting forth as to others covered than the carrier both the affiliation requirement and that of performing part of the transportation service.

In the face of such repeated demonstrations that Congress makes its purpose plain, when it actually intends to limit the coverage of others than carriers to affiliates or to persons performing part of the transportation service, the conclusion hardly is tenable that it means the same thing when it employs more broadly inclusive language and wholly omits all such limitations. This view is further emphasized, as will appear, by the fact that to cut down the meaning of § 1 as appellees suggest would be to single out the term "forwarding" from all others in the definition and give to it a narrow application none of them possesses.

In view of these facts, it is doubtful that the wording of the definition is sufficiently ambiguous to require construction, more especially in view of the decisions in the *California* and *Oakland* cases. But if room for doubt remains, it is altogether removed by the considerations of policy and history to which we have referred. We turn accordingly to the statutory setting.

In several sections, for example, §§ 15, 16, 17, 20 and 21 (pursuant to which this proceeding began), "other persons" as well as common carriers by water either are made subject to affirmative duties or are prohibited from engaging in certain activities. Section 15[7] requires filing of specified agreements or memo-

[7] "Every common carrier by water, *or other person subject to this Act*, shall file immediately with the board [commission] a true copy, or, if oral, a true and complete memorandum, of every agreement, with another such carrier *or other person subject to this Act*, or modification or cancellation thereof, *to which it may be a party or conform in whole or in part*, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; *controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports* or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; *or in any manner providing for an exclusive, preferential, or cooperative working arrangement.* The term 'agreement' in this section includes understandings, conferences, and other arrangements.

"The board [commission] may by order disapprove, cancel, or modify any agreement, or any modification or cancellation thereof, whether or not previ-

randa with the Commission and exempts from the operation of the antitrust laws arrangements made by carriers and "other persons" among themselves or with one another which have been filed with *and approved by* the Commission.[5] The Commission is given the power to disapprove, cancel or modify, among others, any agreement which it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers or ports, or between United States exporters and their foreign competitors; or to operate to the detriment of the commerce of the United States; or to be in violation of the Act. Obviously agreements or understandings between forwarders or between forwarders and shippers or between forwarders and carriers may be discriminatory in such a way as to violate the provisions of § 15. Moreover, since forwarders arrange the terms of carriage for shippers with carriers, they may be the active agents who bring about the very types of agreement or arrangement the section contemplates the Commission shall have power and opportunity to outlaw.

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ously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be in violation of this Act, and shall approve all other agreements, modifications, or cancellations.

"Agreements existing at the time of the organization of the board [commission] shall be lawful until disapproved by the board [commission]. It shall be unlawful to carry out any agreement or any portion thereof disapproved by the board [commission].

"All agreements, modifications, or cancellations made after the organization of the board [commission] *shall be lawful only when and as long as approved by the board [commission]*, and before approval or after disapproval, it shall be unlawful to carry out ~~in whole~~ or in part, directly or indirectly, any such agreement, modification, or cancellation.

"Every agreement, modification, or cancellation *lawful under this section* shall be excepted from the provisions of the Act approved July second, eighteen hundred and ninety, entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies,' and amendments and Acts supplementary thereto, and the provisions of sections seventy-three to seventy-seven, both inclusive, of the Act approved August twenty-seventh, eighteen hundred and ninety-four, entitled 'An Act to reduce taxation, to provide revenue for the Government, and for other purposes,' and amendments and Acts supplementary thereto.

"Whoever violates any provision of this section shall be liable to a penalty of $1,000 for each day such violation continues, to be recovered by the United States in a civil action." 39 Stat. 733; 46 U. S. C. § 814. (Emphasis added.)

[5] See the language of the statute, note 7 *supra*; and see Legislation, 17 Col. L. Rev. 357, 358. It should not be necessary to emphasize, in view of the statute's plain language, that, as indicated, the exemption arises *not* upon the mere filing of the agreement, but *only after approval* by the Commission.

Consequently jurisdiction by the Commission over forwarders would seem essential to effectuate the policy of the Act and the absence of jurisdiction well might prevent giving full effect to that policy.

Section 16[9] forbids various forms of discrimination, as well as other practices, on the part of any common carrier by water "or other person," which an independent forwarder readily may commit or induce. It is suggested, however, that whatever discriminations might be practiced necessarily would be in pursuance of an agreement between a carrier and a forwarder who, it is well to point out again, acts as agent of the shipper; and that since Congress has given the Commission jurisdiction over the carriers, it is to be presumed that such jurisdiction was thought to be sufficient.

Whether or not the premise is correct, the conclusion does not follow. That the Commission may have jurisdiction over one of the two parties to a discriminatory agreement or arrangement hardly means that it shall not have jurisdiction over both. Indeed, unless the jurisdiction includes both, it may be ineffective as to the one covered; for the Commission then might lack the necessary means of obtaining or checking upon information (cf.

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[9] "That it shall be unlawful for any *shipper*, consignor, consignee, *forwarder*, broker, or other person, *or any officer, agent, or employee thereof*, knowingly and willfully, directly or indirectly, *by means of false billing, false classification, false weighing, false report of weight*, or by any other unjust or unfair device or means *to obtain or attempt to obtain transportation* by water for property *at less than the rates or charges* which would otherwise *be applicable*.

"That it shall be unlawful for any common carrier by water, *or other person subject to this Act*, either alone *or in conjunction with any other person*, directly *or indirectly*—

"First. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

"Second. To allow any person to obtain transportation for property at less than the regular rates or charges then established and enforced on the line of such carrier *by means of false billing, false classification, false weighing, false report of weight*, or by any other unjust or unfair device or means.

"Third. To *induce, persuade, or otherwise influence any marine insurance company or underwriter*, or agent thereof, not to give a competing carrier by water as favorable a rate of insurance on vessel or cargo, having due regard to the class of vessel or cargo, as is granted to such carrier *or other person subject to this Act*.

"Whoever violates any provision of this section shall be guilty of a misdemeanor punishable by a fine of not more than $5,000 for each offense." 39 Stat. 734, as amended by 49 Stat. 1518; 46 U. S. C. § 815. (Emphasis added.)

§ 21) necessary to ascertain the existence of a discrimination or to take other action commanded by the statute. Moreover, some of the practices forbidden appear to be peculiarly if not exclusively susceptible of commission or inducement by forwarders, brokers and shippers' agents, all specifically mentioned in the section.

The purpose of § 17,[10] in relevant part, is to provide for the establishment, observance and enforcement of just and reasonable regulations and practices relating to or in connection with the receiving, handling, storing or delivering of property. By the nature of their business, independent forwarders are intimately connected with these various activities. Here again, unless the Commission has jurisdiction over them, it may not be able effectively to carry out the policy of the Act.

Section 20,[11] which for the most part was copied from § 15(11) of the Interstate Commerce Act, forbids the disclosure of confidential information by a common carrier by water or other person,[12] when the information might be used to the detriment or prejudice of a shipper or consignee, or of a carrier, or might improperly disclose his business transactions to a competitor.

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[10] ". . . Every such carrier *and every other person subject to this Act shall* establish, *observe*, and enforce *just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property.* Whenever the board [commission] finds that any such regulation or practice is unjust or unreasonable it may determine, prescribe, and order enforced a just and reasonable regulation or practice." 39 Stat. 734; 46 U. S. C. § 816. (Emphasis added.)

[11] That it shall be unlawful *for* any common carrier by water *or other person subject to this Act*, or any officer, receiver, trustee, lessee, agent, or employee of such carrier or person, *or for any other person authorized by such carrier or person to receive information, knowingly to disclose* to or permit to be acquired by any person other than the shipper or consignee, without the consent of such shipper or consignee, any information concerning the nature, kind, quantity, destination, consignee, or routing of any property tendered or delivered to such common carrier *or other person subject to this Act* for transportation in interstate or foreign commerce, which information may be used to the detriment or prejudice of such shipper or consignee, or which may improperly disclose his business transactions to a competitor, or which may be used to the detriment or prejudice of any carrier; and it shall also be unlawful for any person to solicit or knowingly receive any such information which may be so used." 39 Stat.735; 46 U. S. C. § 819. (Emphasis added.) Exceptions are made for disclosure in response to legal process, etc.

[12] Section 15(11) of the Interstate Commerce Act, 15 U. S. C. § 15(11), does not contain the "other person" provision. The coverage of the two sections, however, is so broad that it probably would include forwarders even though they were not within the coverage of other sections.

Finally, § 21, which is immediately involved in this case, requires the filing of reports, records and documents relating to the business of persons subject to the Act.

The intimate relationship of the forwarder to both shipper and carrier, essentially that of go-between, gives him not only unique sources of information, perhaps in its totality available to no one else, but also unique opportunity to engage in practices which the Act contemplates shall be subject to regulation, some of which we have emphasized in quoting the statutory provisions. The statute throughout is drawn in very broad terms. It forbids direct or indirect accomplishment of the outlawed acts. It broadly covers specific practices, including false billing, classification, weighing, and the manner of placing insurance, § 16, as well as general practices resulting in forbidden evils, §§ 15, 17, which forwarders, affiliated or independent, are favorably placed to bring about. It mentions forwarders specifically, not only in § 1, but elsewhere, e. g., § 16, without suggestion of distinction between independent and affiliated operators. To include the latter but exclude the former would be incongruous, not only for want of any such explicit suggestion, but because inclusion of one without the other would create a statutory discrimination tending in time to force out the affiliated forwarder and, with that achieved, to remove forwarding entirely from the reach of the regulatory plan. We do not believe that Congress had in mind such a self-defeating scheme. Almost as well might it have exempted all forwarders in the first place. Nor do we think the design of the Act was merely by indirection to forbid carriers or their affiliates to act as forwarders.

The legislative history clearly supports this view, although for explicit statement it is scanty. No discussion concerning the meaning of "any person [not a carrier] carrying on the business of forwarding . . . in connection with a common carrier by water" appears except in the statement of the manager of the bill in the House of Representatives.[13] When dealing with the breadth of the term "other person subject to the Act," he said: "Hence, if this board [the United States Shipping Board] effectually regulates water carriers, it must also have supervision of all those incidental facilities connected with the main carriers . . . ." 53 Cong. Rec. 8276. Certainly this language is not

[13] Representative Alexander, then Chairman of the Committee on the Merchant Marine and Fisheries.

indicative of intent to give a narrowly restricted scope to the definition's coverage. Quite the opposite is its effect.

The more significant legislative history, however, appears in the metamorphosis which this provision of § 1 underwent during the process of enactment. A predecessor bill (H. Rep. 14337, 64th Cong.) worded the definition as follows:

> "The term 'other person subject to this act' means any person not included in the term 'common carrier by water' and carrying on the business of forwarding, *ferrying, towing,* or furnishing *transfer, lighterage,* dock, warehouse, or other terminal facilities *in or in connection with the foreign or interstate commerce of the United States.*" (Emphasis added)

As this was revised in the bill which was enacted (H. Rep. 15455, 64th Cong.), two changes occurred, apart from adding explicit mention of wharfage as among the terminal services. One was to eliminate the words "ferrying, towing, . . . transfer, lighterage." The other was to substitute "*in connection with* a common carrier by water" for "*in or in connection with* the foreign or interstate commerce of the United States."

Had this latter wording been retained there could not have been the remotest basis for suggesting that independent forwarders were not covered, as there could have been none with reference to any of the other businesses or services mentioned. But, for a reason wholly unrelated to narrowing the class of forwarders and others not carriers who had been included, the original concluding phraseology was changed. That language was obviously inexact when applied, as the Shipping Act did apply, to carriage by water and incidental activities. Taken literally, the broad wording would have included forwarders and others furnishing terminal facilities in connection with shipments by rail. Obviously it was to eliminate this incongruity, and not to constrict the classes of "other persons" previously enumerated, that this change was made.

That it had no other purpose appears, moreover, from the elimination of "ferrying, towing . . . transfer, lighterage," which shows that when Congress wished to cut down the classes originally covered it did so attentively and explicitly. These eliminated persons were included originally, along with forwarders and others, not simply to reach affiliates of carriers, but broadly to provide "for equal treatment to all shippers and water carriers

by transfer and lighterage concerns *when forming a link in* interstate or foreign commerce."[14] (Emphasis added.) Nothing in the hearings, the committee reports, or the debates, upon the original or the substituted bills,[15] suggests either an original intention to restrict to carrier affiliates the coverage of forwarders or other furnishers of terminal or "link" service or a later intention to change the initial broad coverage by so restricting it. Silence so complete cannot be taken as the voice of change. The original congressional purpose clearly was to reach all who carry on the specified activities, whether in or out of affiliation with a carrier. That purpose remained unaltered by anything which took place in the course of transition from the first to the final form in which the bill was enacted.

Indeed, we held as much in the cases of *California* v. *United States* and *City of Oakland* v. *United States, supra*. The decision was that the Commission has jurisdiction over state and municipally owned businesses furnishing terminal facilities. The ruling would include *a fortiori* privately owned independent businesses of the same type. It would be a strange reading of the "other person" provision if forwarders alone were required to be affiliated in order to come within its terms, all others covered in both the original and the final forms of the legislative proposals being either independent or affiliated. Yet this is, in effect, appellees' exact contention and the view taken by the District Court. As has been noted,[16] that court misconceived the facts in the *Oakland* case and thus perhaps, at the time of entry of its final order, the full scope and effect of our decision.[17] At any rate, since Congress has

[14] H. Rep. No. 659, 64th Cong., 1st Sess., 32. It is true that no comparable explicit statement appears concerning forwarding or terminal activities. But in the absence of distinguishing language, the original coverage of "ferrying, towing . . . transfer, lighterage" hardly can be taken to have been broader, as respects affiliation, than "forwarding, . . . or furnishing dock, warehouse, or other terminal service"; and the elimination of the former cannot be said to have restricted the latter in this respect or, in view of the decision in the *California* and *Oakland* cases, to have singled out forwarding alone for such restriction.

[15] Hearings on H. Rep. 14337 before the House Committee on the Merchant Marine and Fisheries, 64th Cong., 1st Sess.; Hearings on H. Rep. 15455 before the Senate Subcommittee on Commerce, 64th Cong., 1st Sess.; H. Rep. No. 659, 64th Cong., 1st Sess.; S. Rep. No. 689, 64th Cong., 1st Sess.

[16] See note 5.

[17] The District Court's opinion, 55 F. Supp. 682, was filed November 30, 1943, and refers to the *California* case, but it makes no reference to the *Oakland* case, although both were then pending here. The court's further

indicated no intention to single out forwarders for regulation only when they are affiliated with a carrier, while at the same time broadly covering terminal operators and others, we are not free to inject such a distinction.

What has been said disposes of the principal contentions and issues. Appellees however offer other arguments, founded chiefly in the absence of prior established administrative practice,[18] but also in the history of interstate commerce legislation affecting nonwater transportation and in decisions relating to that legislation.[19] We regard these considerations as inapposite to the problem raised by this case in connection with the quite different wording, coverage, history and, to some extent, policy of the Shipping

opinion, filed March 8, 1944, upon the motion for reargument, makes no reference to either of these cases. The findings of fact and conclusions of law were filed November 30, 1944, and judgment was entered the same day, nearly eleven months after our decision in the *California* and *Oakland* cases had been announced on January 3, 1944. As has been stated, see note 5, in the *Oakland* case, except in one instance, there was no showing of affiliation with a carrier, whether by continuing agreement or otherwise.

[18] It is pointed out that until the present proceeding neither the United States Maritime Commission nor its predecessor, the United States Shipping Board, attempted to exercise jurisdiction over forwarders such as the appellees. See, however, Fifth Annual Report of the United States Shipping Board, p. 10. It is not to be inferred however that either of those bodies held the view that they were without such jurisdiction or that, if either did, that fact would be conclusive. An administrative agency is not ordinarily under an obligation immediately to test the limits of its jurisdiction. It may await an appropriate opportunity or clear need for doing so. It may also be mistaken as to the scope of its authority. Cf. Social Security Board v. Nierotko, No. 318, this Term, decided this day.

Although failure to exercise power may be significant as a factor shedding light on whether it has been conferred, see Federal Trade Commission v. Bunte Bros., 312 U. S. 349, that fact alone neither extinguishes power granted nor establishes that the agency to which it is given regards itself as impotent. The present case, by virtue of differences from that of *Bunte Bros.* relating to the clarity and definiteness of the statute's terms, the policy of the Act, and the legislative history, is one which falls within the pronouncement: "Authority actually granted by Congress of course cannot evaporate through lack of administrative exercise." 312 U. S. at 352.

[19] Appellees strongly urge that this case is governed by the construction of the phrase "in connection with transportation" in the Interstate Commerce Act, cited and discussed in the text above (see Lehigh Valley R. Co. v. United States, 243 U. S. 444), and for this view rely upon United States Navigation Co. v. Cunard S. S. Co., 284 U. S. 474, 481, which held that the Shipping Act and the Interstate Commerce Act, "each in its own field, should have like interpretation, application and effect." As we have stated, the phrase "connected with transportation," in the entirely different setting of the Interstate Commerce Act, is so dissimilar in terms and setting to the phrase "in connection with a common carrier by water" as used in the Shipping Act that the interpretation of the former cannot be controlling in determining the meaning of the latter.

Act, for reasons already set forth in part and for others briefly indicated in the marginal notes attached to this paragraph.[20]

It remains only to notice the further objections that the case does not involve the use of forwarders by carriers to evade regulations applicable to carriers; and that to hold independent forwarders "subject to the Act" will bring them under its regulatory provisions, in other words, will make them "subject to the Act."

Needless to repeat, it is precisely because we think the latter effect is required by the considerations already set forth that our conclusion has been reached. Moreover, support for it is given by the very terms of the specific regulatory provisions cited to contradict it, as we have pointed out.[21] The ground need not be traversed again. The cited provisions, like § 1, are broad and general. They strike at evils as likely to be perpetrated by independent forwarders as by any of the "other persons" admittedly covered by the Act. They afford no suggestion of application narrowed to affiliated forwarders or of other distinction between them and independent forwarders, such as invariably and in the clearest terms Congress has stated whenever it has dealt with forwarders by land.

The common sense of all this, of course, is that Congress knew what it was about in both instances. We cannot ignore its repeated demonstrations of that fact. To do so would be to rewrite the statute, injecting limitations of affiliation no more rightfully within our function than inserting others of physical participation in the transportation service proper or of financial responsibility for it. These admittedly cannot go in, although there would be as much warrant for adding them as for putting in affiliation.

Statutes may be emasculated as readily and as much by unauthorized restricted reading as by one unduly expansive. And the wisdom of the regulation of forwarders with the corresponding restriction of competitive freedom in the business is the concern

[20] Appellees' contentions that there was no evidence to support a finding by the Commission that they were engaged in the business of forwarding "in connection with" a common carrier by water and that the District Court erroneously refused to set aside the order of August 21, 1942, are founded in their view that the Act requires affiliation. For this and other reasons it is not necessary to consider them further.

[21] See notes 7, 9, 10, and discussion in the text.

of Congress, not of this Court. We leave the statute as Congress enacted it.

It is inherent in the view we take of the statute that more is involved than merely a carrier's attempt to immunize itself against the Act's penalties by using a forwarder to evade the regulations made binding on carriers. In that respect forwarders are obviously no different from other persons, for the Act does not permit such evasion by a carrier whether through the use of forwarders or any other persons. What is more important is that the Act is designed and in terms undertakes not only to prevent such evasion by carriers through denying them immunity when they hide behind forwarders; it also denies immunity to the forwarders themselves when they commit the acts or practices carriers and others subject to the Act are forbidden to perform.

The judgment is reversed and the cause is remanded for further proceedings in conformity with this opinion.

Mr. Justice JACKSON took no part in the consideration or decision of this case.

# SUPREME COURT OF THE UNITED STATES.

No. 44.—October Term, 1945.

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| United States of America, Appellant, *vs.* American Union Transport, Inc., D. C. Andrews & Co., Inc., Atlantic Forwarding Co., Inc., et al. | On Appeal from the District Court of the United States for the Southern District of New York. |

[February 25, 1946.]

Mr. Justice Frankfurter dissenting, with whom Mr. Justice Black and Mr. Justice Douglas concur.

It is important to keep in mind what this case is not. It does not involve the power of the Maritime Commission to obtain from a forwarder all information relevant to any inquiry by the Commission, based on complaints of violations of the Shipping Act or on its own motion. Section 27 of that Act gives the Commission such subpoena powers and subjects every person, forwarder or not, to testimonial compulsion. 39 Stat. 728, 737, 46 U. S. C. § 826. Nor does the case involve the attempt of a carrier to use a forwarder as a means of evading the regulations by which water carriers are controlled. By no such indirection can a carrier immunize itself against the Act's penalties. Compare *Lehigh Valley R. R. Co.* v. *United States*, 243 U. S. 444.

The case is this. The business of these appellees is to negotiate on behalf of shippers for shipping space and to make the necessary administrative arrangements for the carriage of goods. They have no part in the physical process of moving goods. They have no corporate, physical, or financial tie with the carriers. The sole question here is whether such business has been brought under the regulatory scheme of the Act. The Commission contends that they are "persons subject to the Act." If the Commission is correct, these forwarders would have to submit all sorts of agreements with carriers and with other forwarders to the Commission for approval (39 Stat. 733, 46 U. S. C. § 814), whereupon such agreements may be freed from the restrictions of the Sherman Law; they would be required to maintain uniform rates (39 Stat. 734, 46 U. S. C. § 815); they would be subject to the

Commission's supervision insofar as their activities involved practices pertaining to the handling and care of shipments (39 Stat. 734, 46 U. S. C. § 816); they would have to file reports and business records called for by the Commission (39 Stat. 736, 46 U. S. C. § 820); they would be subject to the Commission's power to award reparations for violations of the Act (39 Stat. 736, 46 U. S. C. §821); and they would be liable to heavy penalties (39 Stat. 734, 736, 738, 40 Stat. 900, 902, 46 U. S. C. §§ 815, 820, 831, 839).

The Shipping Act has been on the statute books since 1916. Yet not until 1942 did the agency charged with the duty of enforcing the Act deem forwarders of this type to be covered by it. The scope of its legislation is, of course, for Congress to determine and not for the enforcing agency. Inaction, no matter how consistent and long-continued, cannot contract the reach of a statute. But much has properly been said about the important significance which attaches to the meaning given a statute by those whose duty it is to enforce it and who are deemed especially equipped to breathe life into inert language. Just as assumption of jurisdiction by an administrative agency for a long period of time goes a long way to prove that powers exercised were impliedly given, see *United States* v. *Midwest Oil Co.*, 236 U. S. 549, a consistent and unexplained failure to exercise power not obviously conferred by legislation may be equally persuasive that the power claimed was never conferred. It is not to be presumed that for decades officials were either ignorant of the duties with which Congress charged them or derelict in their enforcement.

A consideration of the language of the legislation in its proper setting makes it abundantly clear that the failure of the Commission and its predecessor for more than twenty-five years to exercise the authority which it now claims was due neither to ignorance nor to indifference. The explanation that would spontaneously occur to one for such administrative practice is, I believe, the right one: the power was not exercised because Congress did not grant it.

It is a fair generalization that Congress has never supplanted the forces of competition by administrative regulation until a real evil had, in the opinion of Congress, manifested the need for it. One turns in vain to the Congressional investigation which led to the Shipping Act, to the hearings on the bills which became

that Act, to the reports on which it was based, to the experience under the Act since its inception, as reflected in the reports of the Maritime Commission and its predecessor the Shipping Board, for any indication that the business of independent forwarders, like those in this case, was so conducted as to make their regulation appropriate either to curb practices themselves inimical to the public interest or to render effective the regulation of water carriers.

The Commission's claim of jurisdiction must rest on construction of the phrase "business of forwarding . . . in connection with a common carrier by water." 39 Stat. 728, 46 U. S. C. § 801. Whatever the "business of forwarding" may here mean effect must be given to the qualifying phase "in connection with a common carrier by water." If it is left without any appropriate function unless these independent forwarders are covered, it must be applied to them. But if ample scope can be given to the phrase without attributing to Congress such a sudden assumption of authority over independent forwarders although no need for taking such control had been revealed, we should avoid undue extension of language as part of our duty to give fair meaning to what Congress has said.

Abstractly it may be argued that "forwarding" was intended to cover only those activities which included the physical transportation or movement of goods from one place to another. *Cf. e. g.*, H. R. 9089, 9090, 9888, 76th Cong., 3d Sess. (1940); S. 3665, 3666, 4096, 76th Cong., 3d Sess. (1940). Support for such a restrictive meaning might be drawn from the fact that the "other persons" subject to the Act were those concerned with the physical handling of the goods. But such a construction would disregard the purpose of the statute. Again, the term may be said to cover only those businesses in which the forwarder assumes the liability for safe shipment of the goods from point of shipment to their destination. *Cf.* 56 Stat. 284, 49 U. S. C. Supp. IV § 1002 (a) (5) (B). Such a construction likewise does not harmonize with the aims of the statute. The most natural meaning of "forwarding" includes the business in which these appellees engage, namely, the rendering of administrative and brokerage services. *Cf.* H. R. Rep. No. 1682, 77th Cong., 2d Sess. (1942).

But Congress did not regulate "forwarders"; it regulated the "business of forwarding . . . in connection with a common

carrier by water." When, then, is forwarding "in connection with a common carrier by water"? That term may mean a business or financial connection; it may mean a physical connection, *i. e.*, the mutual handling of goods; it may mean both. Or it may mean any share in the process of offering of goods for water shipment. This last construction would mean that the restriction could have been included only for the purpose of excluding forwarders like these but concerned with shipment by rail. Such is the Commission's essential argument, that the phrase is merely a saving clause against its application to forwarders dealing with land carriers. To suggest that such a roundabout method was used for the purpose of saying that this statute was not impliedly intended as an amendment to the familiar Interstate Commerce Act, 24 Stat. 379, 49 U. S. C. § 1, amendments to which have always been designated as such, the administration of which was vested with a different Commission, the Interstate Commerce Commission, and the subject matter of which was completely distinguishable in the very titles of the statutes, is to attribute a fanciful abundance of caution, and less than common sense to the draughtsman. If every forwarder dealing with water carriers was to be covered by the Act, the obvious way of covering them would have been simply to say "forwarders" without qualification. The Commission really asks us to disregard the duty of courts to give effect to every phrase used by Congress. The construction which is now accepted means that "in connections with a common carrier by water" are perfectly superfluous words and are to be deleted. Significance must be given to the qualification. What more reasonable than to hold that this phrase means those forwarders who are so closely tied to the business of the water carrier, by corporate, financial, or physical union, as to make regulation of them appropriate in order to control effectively the carriers with which they are affiliated? Such a forwarder is really a part of the process of carrying. Here the forwarders are closely connected not with the carrier but with the shipper.

That such construction respects Congressional purpose is reinforced by Congressional action regarding forwarders dealing with land carriers. When Congress, in 1942, first regulated such land-carrier forwarders, 56 Stat. 284, 49 U. S. C., Supp. IV, § 1001, forwarders, having the same functions in relation to land traffic these appellees do in relation to water-borne traffic, were not

included. And yet it is argued that Congress thirty years ago asserted control over such forwarders concerned with water-borne traffic and forbade ordinary competition among them, though no basis in experience can account for such action by Congress.

*California* v. *United States*, 320 U. S. 577, involved a totally different situation. That case was concerned with wharves—facilities physically connected with water carriers. These were just as much the agents of the carrier as of the shipper; they formed an integral part of the carrier's business. As a matter of physical fact, the "connection" of these forwarders to a carrier is very different from the "connection" of wharf facilities to the carrier. Awareness of that fact was demonstrated by the specific omission, in the *California* opinion, of the term "forwarder" in considering whether port facilities were "connected" with water carriers. See *California* v. *United States*, *supra*, at 586. The difference in fact and in business relation between the forwarders' "connection" in this case, constituting merely an aspect of the shipper-carrier relationship, and the "connection" in the *California* case, which normally involves a closs business tie with the carrier, is vital and should be observed in applying a section in which Congress dealt compendiously with various enterprises outside of, but related to, the regulated functions of water carriers.